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In The

Supreme Court of the United States

WILLIAM D. McCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL AND DAVID W. ZIEGNER, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE INDIANA UTILITY REGULATORY COMMISSION,

Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY AND SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

AMICI CURIAE BRIEF OF SCEPTER, INC., AND INDIANA INDUSTRIAL ENERGY CONSUMERS, INC. IN SUPPORT OF RESPONDENT MIDWESTERN GAS TRANSMISSION COMPANY

TODD A. RICHARDSON
Counsel of Record
JOHN F. WICKES, JR.
LEWIS & KAPPES
1700 One American Square
Box 82053
Indianapolis, Indiana 46282-0003
(317) 639-1210

Counsel for Amici Curiae
Scepter, Inc., and Indiana Industrial Energy Consumers, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

118

TABLE OF CONTENTS

Page

I. INTEREST OF AMICI CURIAE 1

II. SUMMARY OF ARGUMENT 2

III. ARGUMENT 4

A. The Indiana Statute Petitioners Seek to Enforce Is Unconstitutional on Its Face, Yet that Pivotal Issue Has Not Been Presented Here for Decision 4

B. Petitioners Failed to Raise Directly through the Federal Judicial Review Process the Issues They Now Wish to Present by Collateral Challenge 8

C. The Seventh Circuit's Decision is in Harmony with Prevailing Law, Including a Recent Decision by This Court Covering Essentially the Same Subject Matter 12

IV. CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Arkansas Electric Cooperative Corp. v. *Arkansas Public Service Commission*, 461 U.S. 375 (1983).....6, 7

Associated Industries of Missouri v. *Lohman*, 511 U.S. 641 (1994).....5, 6

Camps Newfound/Owatonna, Inc. v. *Town of Harrison*, 520 U.S. 564 (1997) 6

Cascade Natural Gas Corp. v. *FERC*, 955 F.2d 1412 (10th Cir. 1992).....7, 13

Chemical Waste Management, Inc. v. *Hunt*, 504 U.S. 334 (1992)..... 6

City of Philadelphia v. *New Jersey*, 437 U.S. 617 (1978)..... 6

City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958)..... 10

Federal Power Commission v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972)..... 10

Healy v. *Beer Institute*, 491 U.S. 324 (1989)..... 6

Michigan Consolidated Gas Co. v. *FERC*, 883 F.2d 117 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990)..... 13

Michigan Consolidated Gas Co. v. *Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990)..... 13

National Association of Regulatory Utility Commissioners v. *FERC*, 823 F.2d 1377 (10th Cir. 1987) 10

National Fuel Gas Supply Corp. v. *Public Service Commission*, 894 F.2d 571 (2d Cir.), *cert. denied*, 497 U.S. 1004 (1990)..... 9

TABLE OF AUTHORITIES – Continued

Page

New Energy Co. v. *Limbach*, 486 U.S. 269 (1988) 6

New England Power Co. v. *New Hampshire*, 455 U.S. 331 (1982) 6

New York v. *FERC*, 122 S. Ct. 1012 (2002) 12, 13, 14

Oklahoma Natural Gas Co. v. *FERC*, 906 F.2d 708 (D.C. Cir. 1990) 13

Pennsylvania v. *West Virginia*, 262 U.S. 553 (1923) 6

Public Utilities Commission v. *FERC*, 900 F.2d 269 (D.C. Cir. 1990) 13

Williams Natural Gas Co. v. *City of Oklahoma City*, 890 F.2d 255 (10th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990) 10

Wyoming v. *Oklahoma*, 502 U.S. 437 (1992) 6, 7

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Commerce Clause, U.S. Const. Art. I, §8, cl. 3 5

Natural Gas Act, 15 U.S.C. §717 *et seq.* 12

Natural Gas Act §1(b), 15 U.S.C. §717(b) 12

Natural Gas Act §19, 15 U.S.C. §717r 9

Natural Gas Act §19(a), 15 U.S.C. §717r(a) 9

Natural Gas Act §19(b), 15 U.S.C. §717r(b) 9

Federal Power Act, 16 U.S.C. §824 *et seq.* 12

Ind. Code §8-1-2-87.5(b) 5

Ind. Code §8-1-2-87.6 5

TABLE OF AUTHORITIES – Continued

Page

Supreme Court Rule 10 14

Supreme Court Rule 37.2(a) 1

ADMINISTRATIVE AGENCY ORDERS

FERC Order No. 888 ..... 3, 4, 12

In re Midwestern Gas Transmission Co., 85 FERC ¶61,358 (1998) 9, 10

I. INTEREST OF AMICI CURIAE

This amicus brief is submitted jointly on behalf of Scepter, Inc. ("Scepter") and Indiana Industrial Energy Consumers, Inc. ("INDIEC").[1]

This appeal arises from an action in which a federally regulated interstate pipeline, Midwestern Gas Transmission Company ("Midwestern"), sought declaratory and injunctive relief with respect to regulatory proceedings before a state agency challenging two arrangements that had been authorized by the Federal Energy Regulatory Commission ("FERC"). The arrangements in question involved direct connections between Midwestern's interstate pipeline facilities and two end use consumers located in southern Indiana, through which the consumers could receive natural gas purchased from suppliers outside of Indiana without going through the system of the local gas utility serving the region, Southern Indiana Gas and Electric Company ("SIGECO"). SIGECO commenced three proceedings before the Indiana Utility Regulatory Commission ("IURC") challenging the arrangements under Indiana law, two directly against Midwestern and the third naming one of the consumers

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[1] This brief is submitted pursuant to Supreme Court Rule 37.2(a) with the written consent of all parties, copies of which are attached hereto. This brief was not authored in whole or in part by counsel for Midwestern or any other party. No person or entity other than these amici curiae, their members and counsel has made any monetary contribution to the preparation or submission of this brief. Neither Scepter nor INDIEC are publicly held, neither have any parent corporations and no publicly held companies own 10% or more of either corporation's stock.

as respondent. Midwestern then commenced the underlying action to enforce the FERC authorizations and enjoin the conflicting IURC proceedings.

Scepter is one of the two consumers that implemented a direct connection to Midwestern's pipeline (the other is Grain Processing Corporation, "Grain Processing") and is the named respondent in one of the three IURC proceedings that are at issue here. Accordingly, Scepter has a direct and substantial interest in the outcome of this case. INDIEC is an organization whose members operate industrial facilities located in Indiana that consume large volumes of natural gas and electricity; neither Scepter nor Grain Processing, however, is a member of INDIEC. INDIEC represents the industrial viewpoint on legislative, regulatory and administrative issues relating to energy consumption by industrial consumers in Indiana, and has an interest in the development of responsible energy policies that will encourage economic development by promoting the availability of competitive, low-cost energy. In the proceedings below, both Scepter and INDIEC were granted leave to appear as amici curiae by the Seventh Circuit, where they filed separate amicus briefs supporting Midwestern.

II. SUMMARY OF ARGUMENT

In addition to the points presented by Midwestern, this case does not warrant discretionary review by this Court for three reasons. First, the petition and the supporting SIGECO submission fail to acknowledge the constitutional infirmity of the Indiana statute under which

the IURC seeks to proceed. That statute discriminates on its face against interstate commerce and in favor of Indiana suppliers, and hence is invalid under dormant Commerce Clause principles. At the Seventh Circuit, however, the IURC commissioners and SIGECO argued that the constitutional issue was not preserved for appeal, thereby clouding this Court's ability to decide the merits without leaving a pregnant and dispositive question unanswered.

Second, the procedural posture makes this case a poor vehicle for deciding the ultimate questions of FERC jurisdiction argued in the petition. This is not a direct appeal from a FERC order asserting jurisdiction, but rather concerns the reversal of a dismissal of a declaratory judgment action on abstention grounds. Neither the IURC commissioners nor SIGECO address the exclusivity of the federal judicial review procedure by which the FERC authorizations at issue could have been challenged. That omitted issue provides an independent basis for barring collateral challenges before state tribunals.

Third, this Court's recent decision affirming FERC Order No. 888 militates against granting the petition here. That decision comprehensively addressed the interaction between FERC and state jurisdiction in the context of FERC's initiatives to facilitate competition in the energy industry, the same general subject the IURC commissioners and SIGECO seek to revisit in this case. The Seventh Circuit's decision here is entirely consistent with that ruling, which confirmed FERC's jurisdiction over the interstate transmission of electricity to end use consumers. The Seventh Circuit, moreover, reached the same conclusion regarding FERC's exclusive authority over the interstate transportation of natural gas as every other

Circuit that has addressed the issue. There is no split in the Circuits and no compelling need for another decision by this Court covering largely the same issues decided in the FERC Order No. 888 appeal.

III. ARGUMENT

A. The Indiana Statute Petitioners Seek to Enforce Is Unconstitutional on Its Face, Yet that Pivotal Issue Has Not Been Presented Here for Decision

The Indiana statute under which the IURC commissioners seek to act in the proceedings brought by SIGECO was designed to impose state regulation on arrangements involving direct connections between end use consumers and interstate pipelines. It provides, in relevant part:

> Any person, corporation or other entity that:
>
> (1) Is engaged in the transportation of gas from outside Indiana for direct sale or delivery to any end use consumer or consumers within this state;
>
> (2) Is engaged in the transportation of gas solely within this state on behalf of any end use consumer or consumers; or
>
> (3) Is an end use consumer engaged in the transportation within this state of gas owned or acquired by such end use consumer for use in this state, other than transportation on the premises where the gas is consumed;

> is a public utility as defined in section 1 of this chapter and must obtain a necessity certificate from the commission before it may engage in any activities described in this subsection. This subsection does not apply to a gas utility operating pursuant to an indeterminate permit or necessity certificate issued under section 87 of this chapter, nor to the production, sale, and gathering of natural gas produced in Indiana.

Ind. Code §8-1-2-87.5(b).

The statute, in other words, prohibits the transportation of gas "from outside Indiana" to an end use consumer, either directly (subsection (b)(1)) or through an intermediary ((b)(2)-(3)), absent state commission authorization, *unless* the transportation service is provided by a state-regulated gas utility or the gas was "produced in Indiana." *See also* Ind. Code §8-1-2-87.6 (exempting "Indiana produced natural gas" from utility regulation, with limited exceptions). On its face, the statute differentiates between gas transported from outside Indiana and gas produced within the state. It subjects suppliers of interstate transportation services, as well as consumers seeking to do business with such suppliers, to regulatory barriers not faced by in-state suppliers. In obvious purpose and clear effect, it shelters state-regulated local gas utilities from competition by federally-regulated interstate pipelines.

The Commerce Clause, U.S. Const. Art. I, §8, cl. 3, prohibits state laws that discriminate against interstate commerce. *See Associated Industries of Missouri* v. *Lohman*, 511 U.S. 641, 646 (1994). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism –

that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273 (1988). Statutes that discriminate on their face are subject to a "virtually *per se* rule of invalidity." *Associated Industries*, 511 U.S. at 647; *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). Such legislation is unconstitutional unless demonstrably justified, upon the strictest scrutiny, by legitimate local purposes that cannot be adequately served by nondiscriminatory alternatives. *See Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 581-82 (1997); *Healy* v. *Beer Institute*, 491 U.S. 324, 340-41 (1989). The statute here cannot survive that test.

As the Seventh Circuit noted, the State here has no valid interest other than a desire to regulate the interstate market. *See* App. at 7a. The public utility context does not, in itself, establish a valid local interest that would supersede the virtually *per se* rule of invalidity. *See Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 391 (1983) ("Our constitutional review of state utility regulation in related contexts has not treated it as a special province insulated from our general Commerce Clause jurisprudence."). *See also Wyoming* v. *Oklahoma*, 502 U.S. 437, 454-58 (1992); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 339-43 (1982); *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 596-97 (1923).

Still less does the State have a legitimate purpose that cannot be addressed through non-discriminatory alternatives. Asserted concerns relating to local conditions, health and safety (*see* Petition at 17-19) are not justifications for facial discrimination against interstate commerce. *See Chemical Waste Management, Inc.* v. *Hunt*, 504

U.S. 334, 344 (1992) ("The burden is on the State to show that 'the *discrimination* is demonstrably justified by a valid factor unrelated to economic protectionism' ") (emphasis in original, footnote omitted) (*quoting Wyoming*, 502 U.S. at 454). There has been no showing the asserted interests proffered here can only be protected by erecting regulatory barriers targeting interstate suppliers and their customers.

In context, then, the rhetoric presented by the IURC commissioners in terms of state sovereignty and principles of federalism (*see* Petition at 19-21) is cast in the wrong paradigm. This is a situation in which the State seeks to advance an isolationist policy by enforcing a protectionist statute that discriminates against interstate commerce. FERC, by authorizing direct connections between interstate pipelines and end use consumers, has advanced a policy favoring competition and economic efficiency in the national market, to the ultimate benefit of consumers in every state. *See, e.g., Cascade Natural Gas Corp.* v. *FERC*, 955 F.2d 1412, 1422-25 (10th Cir. 1992) (describing rationale for FERC policy). Indiana wishes to frustrate that federal policy and provide shelter to in-state suppliers by imposing regulatory obstacles to interstate transactions. In purpose and effect, Indiana's strategy is unconstitutional.

Rather than confronting the constitutional defect in the statute they seek to enforce, the IURC commissioners and SIGECO have not even included the Commerce Clause challenge in the issues presented in this appeal. *Compare Arkansas Electric Cooperative*, 461 U.S. at 382 n.6 (finding preemption argument made by United States as amicus curiae to be fairly included in Commerce Clause

issue raised by appellant). At the Seventh Circuit, both appellees argued that the constitutional challenge was not properly preserved for appeal. *See* IURC Commissioners Brief of Appellees at 35-36; SIGECO Brief of Appellee at 34-35. Their position, therefore, is that this Court should decide the merits without answering a question of central importance to the very themes they advocate. The Court should not undertake to decide the proper balance between federal and state authority in this case without considering whether the state statute at issue discriminates against interstate commerce, and should not grant a petition implicating serious constitutional problems that the petitioners do not wish to address.

B. Petitioners Failed to Raise Directly through the Federal Judicial Review Process the Issues They Now Wish to Present by Collateral Challenge

The IURC commissioners and SIGECO are pursuing a collateral challenge to FERC's authorizations of the direct connections between Midwestern and the two consumers. They present that challenge in the context of a reversal of a dismissal on abstention grounds of a declaratory judgment action brought in response to state agency proceedings targeting the arrangements authorized by FERC. The convoluted procedural posture is a function of the fact that the IURC commissioners and SIGECO elected not to pursue direct judicial review of the FERC proceedings. Their failure to utilize the exclusive judicial review process provides independent grounds for concluding their collateral attack on the FERC authorizations is contrary to federal law, and the procedural complexities resulting

from that failure make this case a poor vehicle for deciding the jurisdictional questions they wish to address.

As the Seventh Circuit noted, SIGECO and the IURC commissioners had every opportunity to present their arguments within the context of the FERC proceedings. *See* App. at 5a. When FERC was entertaining the request for authorization of the Grain Processing arrangement, SIGECO actively participated in the FERC proceedings and the State intervened through the Indiana Office of Utility Consumer Counselor. *See In re Midwestern Gas Transmission Co.*, 85 FERC ¶61,358 (1998). When the request for FERC authorization of the Scepter arrangement was filed, SIGECO and the IURC received individualized notice as well as notice by publication. *See* 4/26/00 Stokdyk Aff. Ex. C, Request at 2; 64 Fed. Reg. 57,635 (1999). In both instances, FERC granted the requested authorizations, but neither SIGECO nor the IURC (nor any other party) sought judicial review of the FERC proceedings. *See* App. at 17a-18a.

Section 19 of the Natural Gas Act ("NGA"), 15 U.S.C. §717r, establishes the procedure for challenging a FERC determination, through and including review by this Court upon certiorari. *See* NGA §19(b), 15 U.S.C. §717r(b). On its face, the procedure is specifically applicable to a "State commission" and any other party aggrieved by a FERC order. *See* NGA §19(a), 15 U.S.C. §717r(a). The IURC as well as SIGECO, therefore, could have pursued judicial review of the FERC authorizations in accordance with federal law. *See National Fuel Gas Supply Corp.* v. *Public Service Commission*, 894 F.2d 571, 578-79 (2d Cir.), *cert. denied*, 497 U.S. 1004 (1990) (holding state agency

proceedings under state law preempted by FERC authorization; "The [state commission] was free to intervene and present whatever contrary data it wished. It declined to do so.").

When Congress establishes a procedure for judicial review of administrative orders, the statutory framework is the exclusive avenue of recourse and precludes *"de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review." *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (footnote omitted). *Accord Williams Natural Gas Co.* v. *City of Oklahoma City*, 890 F.2d 255, 261-63 (10th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990) (holding state court barred from revisiting issue of preemption underlying FERC assertion of jurisdiction; parties cannot "circumvent the scheme of judicial review under §19 simply by choosing not to file a petition for review with FERC or the court of appeals"). Because the judicial review procedure specified by Congress is exclusive, state tribunals lack jurisdiction to entertain collateral challenges to FERC determinations.

Notably, SIGECO vigorously argued the scope of FERC authority and applicability of Indiana law during the FERC proceedings relating to Grain Processing (*see In re Midwestern Gas Transmission Co.*, 85 FERC ¶61,358 (1998)), and thus was barred by collateral estoppel from relitigating the same issues before the IURC and in the proceedings below. *See National Association of Regulatory Utility Commissioners* v. *FERC*, 823 F.2d 1377, 1382 (10th Cir. 1987) (holding principles of collateral estoppel applied to FERC jurisdictional determination). *See also Federal Power Commission* v. *Louisiana Power & Light Co.*,

406 U.S. 621, 647 (1972) (noting FERC's predecessor had primary authority to determine its jurisdiction and such determination could be reviewed "in due course pursuant to §19(b) of the Act, 15 U.S.C. §717r(b)"). Having presented its theories to FERC unsuccessfully, SIGECO was precluded from seeking a different answer from another tribunal. Insofar as the IURC proceedings at issue were all commenced by SIGECO as petitioner (*see* App. at 16a, 18a), collateral estoppel provides another independent basis for barring the attempted relitigation before a state tribunal.

The IURC commissioners and SIGECO, however, have not presented as issues before this Court the procedural impediments troubling their collateral challenges to the FERC authorizations. They blame the Seventh Circuit for supposedly fostering a "race to the courthouse" mentality (*see* Petition at 19-21), but offer no excuse for their failure to present their arguments through the judicial review process prescribed by Congress. Instead of coming to this Court by direct appeal from the FERC proceedings pursuant to the statutory directive, SIGECO and the IURC commissioners solicit this Court's intervention in support of satellite litigation pursued in defiance of federal law. The issues on which the IURC commissioners and SIGECO wish to focus, therefore, are subject to procedural bars they are obviously reluctant to address.

C. The Seventh Circuit's Decision is in Harmony with Prevailing Law, Including a Recent Decision by This Court Covering Essentially the Same Subject Matter

Subsequent to the filing of the petition by the IURC commissioners, the Court handed down the decision in *New York* v. *FERC*, 122 S. Ct. 1012 (2002), affirming the jurisdictional determinations in FERC Order No. 888. The context and substance of that case parallel the regulatory issues raised here, and the Seventh Circuit's decision in this case is entirely consistent with the legal analysis in *New York*.

The Court in *New York* rejected arguments by the State of New York that FERC's assertion of authority over unbundled retail transmission of electricity encroached on state jurisdiction, explaining that the Federal Power Act ("FPA") granted FERC authority over *both* the sale of electricity at wholesale *and* the interstate transmission of electricity. *See* 122 S. Ct. at 1022-27. *Compare* NGA §1(b), 15 U.S.C. §717(b) (granting FERC jurisdiction over both sales of natural gas for resale and "the transportation of natural gas in interstate commerce"). "Because the FPA authorizes FERC's jurisdiction over *interstate transmissions*, without regard to whether the transmissions are sold to a reseller or *directly to a consumer*, FERC's exercise of this power is valid." *New York*, 122 S. Ct. at 1024 (emphasis added). The Seventh Circuit's conclusion here – that the interstate transportation of natural gas directly to consumers lies within FERC's jurisdiction under the NGA (*see* App. at 4a) – thus closely tracks this Court's construction of the corresponding provisions of the FPA in *New York*.

The subject area addressed in *New York*, furthermore, concerned FERC's initiatives to foster competitive conditions in the interstate energy market. This Court confirmed that FERC acted within its authority by regulating interstate transmissions reaching to end use consumers. In the pending petition, the IURC commissioners seek to revisit the same subject, challenging FERC's authority to promote competition in the interstate gas market by regulating interstate transportation to end use consumers. In terms of policy overtones as well as legal reasoning, the questions raised here have been authoritatively answered in *New York*.

As the Seventh Circuit noted (*see* App. at 4a) and the IURC commissioners acknowledge (*see* Petition at 15 n.8), moreover, the decision here reaches the same conclusion as that of every other Circuit Court that has considered the issue: FERC's jurisdiction over the transportation of gas in interstate commerce confers exclusive authority to regulate direct connections between interstate pipelines and end use consumers. *See Cascade Natural Gas*, 955 F.2d at 1416-21; *Oklahoma Natural Gas Co.* v. *FERC*, 906 F.2d 708, 710 (D.C. Cir. 1990); *Public Utilities Commission* v. *FERC*, 900 F.2d 269, 273-74 (D.C. Cir. 1990); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1299-1302 (6th Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990); *Michigan Consolidated Gas Co.* v. *FERC*, 883 F.2d 117, 121-22 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990). There is no conflict among the Circuits, therefore, necessitating resolution by this Court.

Given the consistency of prevailing law, the IURC commissioners must carry a heavy burden to demonstrate "compelling reason" for granting the petition here.

See Supreme Court Rule 10. The contention that the Seventh Circuit allegedly mischaracterized an aspect of the natural gas market (*see* Petition at 10; SIGECO Brief in Support at 4-7) does not rise to that level. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). The suggestion that important state interests in utility regulation are compromised by FERC's exercise of authority (*see* Petition at 17-19; SIGECO Brief in Support at 7-9) is the same proposition recently examined and rejected in *New York*. The IURC commissioners and SIGECO have not presented any compelling reason for this Court to take up another appeal covering essentially the same territory as a case decided only a few weeks ago.

IV. CONCLUSION

For the foregoing reasons, Scepter and INDIEC respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

TODD A. RICHARDSON
Counsel of Record
JOHN F. WICKES, JR.
LEWIS & KAPPES
1700 One American Square
Box 82053
Indianapolis, Indiana 46282-0003
(317) 639-1210

Counsel for Amici Curiae Scepter, Inc., and Indiana Industrial Energy Consumers, Inc.